

NAVAL WAR COLLEGE

1896

INTERNATIONAL LAW

SITUATIONS

DISCUSSIONS

BY THE

OFFICERS IN ATTENDANCE

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SITUATION NO. 1.

The relations existing between the two leading nations upon the continent of Europe, France and Germany, have become so strained as to make an outbreak of hostilities imminent and highly probable. Both countries are mobilizing their military and naval forces.

In the French ports of Dunkirk, Havre and Cherbourg, a large fleet of naval and mercantile vessels are being assembled, the latter apparently with a view to employment as transports and supply vessels. A large naval force of Germany is being concentrated and assembled in and about the North Sea, especially at Wilhelms-haven and the vicinity of the Kiel Canal; cruising between the North Sea and the terminus of that canal and Heligoland.

On account of the scarcity of French tonnage for the transportation of troops, in what appears to be a maritime expedition, vessels of other nationalities are chartered, at high rates for this purpose, by the French Government. Among other vessels thus chartered are two large American merchant steamers, capable of carrying 1,600 men—infantrymen.

These vessels, lying at Havre, have taken on board troops to their fullest capacity; the vessels, being simply chartered, are officered and manned by Americans and fly the American flag. For their navigation their masters are responsible, but the military control of the troops they carry, as well as the direction of their general movements, is in the hands of the French officers on board.

The vessels assembled at Havre, having completed their loading, sail upon a certain date, and, off Dunkirk, join the vessels that have been preparing at Cherbourg and at Dunkirk. The convoying force is one composed of many vessels of war of the heaviest tonnage and armaments. The destination of this expedition is not made known, and, at the time of its departure from the various ports, war had not been declared between the two countries.

The expedition sails in the direction of Skager Rack. Shortly after leaving the vicinity of Dunkirk, the expedition is sighted by German lookout vessels, some accompanying the expedition, others disappearing in the direction of Heligoland. Shortly after this occurrence, a heavy fog shuts down and some of the transports lose touch with the main body of the expedition. One of the American steamers, the *Rio Grande*, soon after finds itself in the midst of a detached German squadron consisting of four vessels. Being boarded by one of these vessels, and the discovery being made of the service in which she was employed, the *Rio Grande*, still flying the American flag, was directed to follow the squadron. The firing of heavy guns and the view from a partial clearing of the fog giving evidence of the occurrence of an engagement, the *Rio Grande* was placed under the convoy of the smallest of the German vessels, the others going to the scene of the engagement. The *Rio Grande* was conducted to the anchorage off Heligoland, anchoring under the guns of the convoying cruiser. At this anchorage you lie in command of the *Minneapolis*, and to you, as its commanding officer, appeal is made by the master of the *Rio Grande* for protection and release, promise being made of return to Havre. This being refused by the German naval commander and while the matter was in abeyance, the master of the *Rio Grande*, at the instigation of the senior French officer on board, attempted to escape with his ship from the custody of the German. The ship and flag are fired upon by the German cruiser.

At this juncture what action do you take?

Please follow the whole narrative and give views and authorities so far as matters are pertinent to International Law.

DISCUSSION OF INTERNATIONAL LAW SITUATION NO. 1, 1896.

War being imminent the hostile destination of the troops embarked is probable.

The owners of the American steamers, in accepting a charter to carry French troops and placing the movements of their vessels under the control of French officers, evidently knew that they were taking war risks, as they demanded and received war rates. A declaration of war is not necessary to create a war in fact. The nature of the risks they accepted is shown in Hall, page 626, where it is stated that a neutral individual who makes a specific bargain to carry despatches or persons in the service of the belligerents, for belligerent purposes, personally enters the service of the belligerent. Wheaton, page 563, states:

A neutral vessel which is used as a transport for the enemy's forces is subject to confiscation if captured by the opposite belligerent, nor would the fact of her having been impressed by violence into the enemy's service exempt her. See also Snow's lectures, Sec. 6, page 144.

The action of the German commander in sending the *Rio Grande* to Heligoland was correct, especially as hostilities had already commenced. But even if he had no knowledge that hostilities had actually begun, it would have been his duty to have captured the *Rio Grande* and carried her into a German port for trial. The hostile intent of the French was so evident to the Germans that they had "concentrated a large naval force in and about the North Sea." The departure of the French fleet from its own coast might, therefore, be properly considered a hostile act.

The right of a nation to preserve itself from injury by anticipating an attack is a perfect right. It is the right of security and is incidental to the right of self preservation.—Twiss, Vol. 1, page 13, par. 14. See also Snow's Lectures, Sec. 21, page 43.

The fact that the *Rio Grande* had an American register and was flying the American flag could not interfere with this right. In the case of the *Virginus*, Snow's cases, page 181, the following quotation from Dana is made:

The register of a foreign nation is not, and by the law of nations is not recognized as being a national voucher and guarantee of national character to all the world, and nations having cause to arrest a vessel would go behind such a document to ascertain the jurisdictional fact which gives the character to the document, and not the document to the fact.

The right, therefore, of the German to visit and search the *Rio Grande*, and, having ascertained her character, to carry her into a German port for trial, was a perfect one. The attempt of the *Rio Grande* to escape from the German cruiser was improper and rendered her liable to recapture and sinking, if necessary, to prevent her escape. In this recapture the commander of the *Minneapolis* has no right to interfere, either to prevent the German cruiser from firing upon the American flag or to recapture and restore to custody the offending vessel himself.

In contracting to carry troops for the French Government, the *Rio Grande* had committed no offense against the laws of the United States, and she had a right to carry her flag until a sentence of condemnation had been passed by a court having jurisdiction. There is a natural feeling that the flag should not be placed in a position to be fired upon, and, therefore, the *Rio Grande* having committed an unneutral act, and made herself liable to German law, should be compelled to haul down her flag until the case shall be settled. But the whole weight of authority is against this. A vessel can no more be controlled in her actions than a citizen, and, as a citizen enlisted in a foreign service has no right to put forward his citizenship as a protection, neither can a private vessel expect her flag or register to protect her in illegal traffic. The country itself cannot be held responsible for the actions of either. The enforcement of the penalty is left to the injured belligerent.

The whole law of contraband is based upon the concession by the neutral state to the belligerent state and its courts of whatever jurisdiction is necessary for self-protection.

The only duty of the commander of the *Minneapolis* would be to communicate all the facts of the case to the United States ambassador at Berlin, and offer his assistance, so far as may be considered necessary, in securing a fair trial for the officers and crew of the *Rio Grande*.

INTERNATIONAL LAW SITUATION NO. 2.

1. The U. S. S. *Madawaska* is lying in the port of Realejo, Peru, for the protection of American interests.

2. A revolution has been in progress in that country for some time, with alternate victory and defeat for each side—the ultimate conqueror cannot be foreseen.

3. Late one night a shore boat came alongside the *Madawaska* with a letter to the commanding officer, Captain Decatur. It is said to be urgent, and an immediate reply is requested. When translated, its import is found to be as follows:

The rebel forces took the capital to-day and established a government. Those of my troops not now prisoners, have fled into the country and are completely routed. I have no hope of reorganizing them. I came here (to Realejo) for personal safety. The rebels are seeking me everywhere, and, if found, my life will be in danger. Will you do a humane and generous act by shielding me from the rage of an infuriated mob, and giving me passage to the nearest Chilian port at your convenience? I cannot abide in safety in my present shelter later than daylight, and, if you decide to receive me, I will come aboard before that time. With sentiments of the most distinguished consideration,

ALFONSO QUALQUIERA,
President of Peru.

4. Qualquiera became President about a year previously, and it was immediately alleged that he obtained the office through the grossest fraud, intimidation, and bribery in the election, and that, after inauguration, he began a course of terrorism—imprisoning and even executing (upon false testimony) some of those most prominent in opposing his election.

And this was the cause of the uprising which had just succeeded in driving him from power. All this was well known to Captain Decatur, as he had been some months in port and the above statements were matters of common notoriety.

5. What should Captain Decatur do under the circumstances ?

6. State the general policy of the United States regarding the right of asylum ?

7. Suppose Qualquiera had been received on board the *Madawaska* and that the new Government, upon learning of it, requested his surrender, should Captain Decatur deliver him ?

8. Would it make any difference upon what ground the surrender was requested, whether on account of political or criminal offenses ?

9. If Qualquiera had been simply a plain citizen, an accused criminal fleeing from legal pursuit, should Captain Decatur have received him ?

10. If he had been instrumental, as a private citizen, in trying to bring about a change of government, and failing, had sought refuge on the *Madawaska* from his enemies, who were in hot pursuit, should Captain Decatur deliver him up on request of the Government ?

11. If Qualquiera had been received, accused of a crime, and his delivery requested, would it be necessary for Captain Decatur to examine the extradition laws, in order to regulate his action ?

12. Is it objectionable to establish the custom of foreign ships of war affording shelter to political refugees? State the arguments for and against such procedure.

NOTE.—The best course for Captain Decatur to pursue, to be formulated from the full argument by the officers in attendance of the various conditions and circumstances of the case, and the law and precedents that may be adduced in support of each position.

Captain Decatur may receive Qualquiera if, in his opinion, the life of the latter is in danger. Of this, Captain Decatur must be the judge. There is no question of right involved in the matter. It is simply one of humanity.

The general policy of the United States has been to discourage the practice of granting asylum. This is clearly expressed by Secretary Fish in a letter to the U. S. Minister to Haiti, in 1875. (Snow's Lectures, page 38.) Article 287, U. S. Navy Regulations, prescribes the duties of naval commanders with reference to this so-called right, as follows:

The right of asylum for political and other refugees has no foundation in International Law. In countries, however, where frequent insurrections occur, and consequent instability of government exists, local usage sanctions the granting of asylum, but even in the waters of such countries officers should refuse all applications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of the refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum.

Having received Qualquiera on board, Captain Decatur should not deliver him up, no matter on what ground his surrender may be requested. Criminal offenses are often charged against political refugees as a pretext to prevent their receiving asylum. Under such circumstances the Peruvian Government would have but one resource, and that would be to prove its case through the regular extraditional system. With that Captain Decatur has nothing to do.

Had Qualquiera been a plain citizen, an accused criminal fleeing from legal pursuit, he should not have been received on board; but if, as a private citizen he had been trying to bring about a change of government, and failing, had sought refuge on the *Madawaska* from his enemies who were in hot pursuit, he would be entitled to the same asylum as any other political refugee, and should not be delivered upon the request of the Government.

A man accused of a crime, not political, should not have been received on board, and should be put on shore. There is no necessity for examining the extradition laws in such a case.

Halleck, Vol. 1, page 216, says:

Whatever may be the nature and extent of the exemption of the public or private vessels of one State from the local jurisdiction in the ports of another, it is evident that this exemption, whether expressed or implied, can never be construed to justify acts of hostility committed by such vessel, her officers and crew, in violation of the law of nations against the security of the State in whose ports she is received, or to exclude the local tribunals and authorities from resorting to such measures of self defense as the security of the State may require. Therefore a public vessel would not hesitate to give up to the local authorities a person accused of a serious crime who might have come on board of her; and it is probable that she might even do so in case of a person evading conscription.

It is, of course, possible that even in such a case, the question of humanity might govern. The local authorities have no right to follow on board or apprehend an accused criminal after he is once on board a vessel of war. If the commander is satisfied, from the anarchical state of the country, that the accused can not have a fair trial, he might refer the matter to his government, and decline to deliver the accused except through the request of the local government by the regular channels of extradition.

The custom of foreign ships of war affording shelter to political refugees is very objectionable, and would not be tolerated by any stable civilized government. The complete sovereignty of every nation within its own territory and territorial waters is a cardinal principle of international law, and the right of asylum can not be admitted without derogation of this principle.

INTERNATIONAL LAW SITUATION No. 3.

An insurrection, serious in extent, has existed for some time in the island of Jamaica. The insurgents have not been able to take and hold any sea port, but have maintained control of a great portion of the inte-

rior of the island. It is claimed by the Government of Great Britain that the insurgent forces have received aid in the way of arms and ammunition and general supplies from the United States. There is undoubtedly a great deal of truth in this claim, and all collectors of customs, and officers of the revenue cutters, as well as commanding officers of naval vessels, have been directed to use every effort to prevent this unlawful traffic.

While the insurrection has existed for some time and a very considerable fighting has been going on, Great Britain declares there is no war in Jamaica, and the United States has not acknowledged the belligerency of the insurgents, nor, in fact, has any other nation.

At this time you are in command of a vessel of the United States lying in the harbor of Port au Prince, Haiti, when you receive a telegram from the U. S. Consul stating that a British war vessel has just entered the harbor of Port Antonio, on the north shore of Jamaica, with an American steamer in tow. A later telegram states, that, having investigated the matter, he finds the vessel to be the steamer *Columbia*, cleared from New York for Curaçao, that her papers and register are all right so far as he can judge; but that she has a large number of passengers on board whom the British claim to be filibusters, and is carrying a supply of arms and ammunition. She was captured about forty miles to the northward and eastward of Jamaica.

You get under way and start immediately for Port Antonio, but, when about fifteen miles from shore, you meet a British vessel of war with a steamer in tow flying the American flag. You recognize the steamer to be the *Columbia* evidently being towed to Kingston where the English Court of Admiralty sits.

What do you do ?

DISCUSSION OF INTERNATIONAL LAW SITUATION NO. 3, 1896.

The right of visitation and search is a war right. In this case there is no war, and, therefore, the English cruiser has none of the rights of a belligerent. The

only justification for the capture of the *Columbia* would be on the ground of self-preservation and self-defense, but, as Mr. Webster said in his correspondence with respect to the *Caroline* affair, there must be shown to exist, "a necessity for self-defense, instant, overwhelming, and leaving no choice of means and no moment for deliberation." This certainly did not exist when the *Columbia* was captured, 40 miles northeast of Jamaica.

The capture of the *Virginus*, carrying the American flag, by a Spanish man-of-war, on the high seas, in 1873, a case which has some points of resemblance to that of the *Columbia* in the Problem, was justified by Mr. Dana; but entirely on the score that the *Virginus* was really a Spanish vessel, being owned by Spaniards, and therefore under Spanish jurisdiction, and consequently not entitled to an American register. "The flag is no protection without the right to use it."

The English commander had no evidence to show the register of the *Columbia* to be fraudulent, nor any reason to suspect her of being owned by the insurgents. That she was somewhat out of her course for Curaçao was true. That she had an unusual number of passengers, with supplies of arms and ammunition, was reason for suspicion and surveillance, but it could be scarcely considered to constitute a case of instant, overwhelming necessity for self-preservation.

The right of the English cruiser to capture the *Columbia* within his own territorial waters is not disputed.

Dana, in a note to Section 23 of his edition of Wheaton, with reference to the recognition of belligerency, says:

Where the insurgents and the parent state are maritime, the liability to political complications, and the questions of right and duty to be decided at once, usually away from home, by private citizens or naval officers, seem to require an authoritative and general decision as to the *status* of the three parties involved. If the contest is a war, all foreign citizens and officers, whether executive or judicial, are to follow one line of conduct. If it is not a war, they are to follow a totally different line. If it is a war, the commissioned cruisers on both sides may stop, search,

and capture the foreign merchant vessel; and that vessel must make no resistance, and must submit to an adjudication by a prize court. If it is not a war, the cruisers of neither party can stop or search the foreign merchant vessel; and that vessel may resist all attempts in that direction, and the ships of war of the foreign state may attack and capture any cruiser persisting in the attempt. If it is a war, the rules and risks respecting carrying contraband, or despatches, or military persons, come into play. If it is not a war, they do not. If it is a war, foreign nations must await the adjudication of prize tribunals. If it is not a war, no such tribunal can be opened.

This exposition of Dana's is quoted approvingly and adopted by Sir Edward Creasy in his "First Platform of International Law."

Mr. Fish, Secretary of State, in a letter to Mr. Borie, Secretary of the Navy, May 18, 1869, quoted in Wharton's Digest, Vol. III., page 147, says:

The right of search cannot be exercised against a neutral who has not recognized both parties as belligerents. If, therefore, the commanders of our men-of-war should ascertain that a vessel of the United States is about to be searched on the high seas by a Spanish vessel, they may be authorized to resist such search with all the force at their disposal. If, also, they should fall in with a vessel of the United States which has been captured by a Spanish vessel on the high seas on the ground of being a carrier of contraband, or any other pretext involving a claim to belligerent rights in that quarter, they may be authorized to recapture the prize if they feel competent for that purpose.

It would, therefore, seem apparent that the capture of the *Columbia* was unjustifiable and a flagrant infringement of the rights of an American vessel, and the American cruiser would be justified in recapturing her by force, if necessary. This would, however, probably result in a war. To take such action, under the conditions of the problem, would be taking a very serious responsibility. It is easy to conceive of circumstances when such action would be mandatory and you would not hesitate a moment, but, in this case, you might readily assume that the illegal conduct of the English naval commander would be disavowed, and proper reparation made through the ordinary channels of diplomacy.

The position of the English government in such a case as this is clearly illustrated in the affair of the *Deerhound*, an English vessel with arms and munitions of war for Don Carlos, which was captured off the Spanish coast on the high seas by a Spanish gunboat. Great Britain demanded and was granted the return of the vessel with all on board, though some of them were prominent adherents of Don Carlos. (Wharton's Digest, Vol. III., Page 153.)

Therefore, while having a clear right to recapture the *Columbia* with force if necessary, the expediency of such action would be questionable.

You should, on meeting the English cruiser, demand the surrender of the *Columbia* to your custody, in view of the fact that, up to the time of her capture, it was impossible for her to have committed any offense other than against the neutrality laws of the United States, and you might with propriety promise to take her back to the United States for trial. Should the surrender be refused, having decided that it was inexpedient to stand upon your perfect right to recapture the *Columbia*, you would accompany the vessels to Kingston, and there renew to the proper authorities your protest and demand, reporting the circumstances and your action to the Secretary of the Navy, Washington.

